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To Fee or Not to Fee: A Review of A Practitioner's Guide to Development Impact Fees

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TO FEE OR NOT TO FEE: A REVIEW OF *A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES*

By James C. Nicholas, Arthur C. Nelson, and Julian C. Juergensmeyer. American Planning Association: Planners Press. 1991. Pp. 294. $54.95.

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A growing number of communities across the nation now look to the private sector for financial help to pay for new service and infrastructure needs. Development impact fees[1] are one way to help raise money for these facilities and services. Impact fees shift some of the burden of accommodating growth away from taxpayers and existing development to new development.[2] Of course, this trend reflects a complementary public mood to require new development to shoulder a larger part of its service and facility needs, popularly known as "pay as you grow."

This practical volume will accomplish the authors' aim of helping local governments use standard procedures to fairly impose development impact fees based on the judicially recognized dual rational nexus standard.[3] It is a why to do it, how to do it, and what not to do guidebook for localities interested in developing such impact fees, drawing together the economics, politics, administration, and legal aspects of these fees.

Development impact fees are scheduled charges applied to new development to generate revenue for the construction or expansion of capital facilities that are located beyond the boundaries of new development and that benefit the contributing development.[4] They are a

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1. *See infra* text accompanying notes 4, 5.

2. JAMES C. NICHOLAS ET AL., A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES xx (1991) [hereinafter PRACTITIONER'S GUIDE].

3. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991).

4. *See, e.g.*, Key West, Fla. Ordinance 84-50 (impact fees imposed on new development to pay proportional shares of costs for new sewage treatment plant and solid waste disposal incinerator) (discussed in PRACTITIONER'S GUIDE, *supra* note 2, at 145-49).

species of development exaction,[5] a process where government grants development approval conditioned upon, among other factors, payments by developers to defray the costs of land, facilities, and equipment in connection with providing new or expanded public facilities.[6]

The authors' main thesis is that the dual rational nexus impact fee is the emerging mainstream approach to calculating impact fees.[7] Impact fees not based on a rational nexus are determined to be either impractical or held to be invalid by the courts.[8] The principal legal advantage of the rational nexus impact fee is its similarity to a user fee[9] and the consequent necessary connection or nexus among the needs generated by the fee payer, the fee payments, and the fee benefits received. To their credit, the authors recognize that even a standardized system of rational nexus impact fees will not pay the total cost for all needed facilities, or even a major share, and that the preponderance of the costs of these facilities still must be paid by taxes or other revenues.[10]

The book is conveniently divided into four sections. The first section reviews the policy and politics of impact fees and places these fees within a planning context.[11] By noting early concepts of exactions, such as mandatory dedications,[12] the authors observe in this section that impact fees are a logical extension of expanding efforts to force new development to pay its fair share of new development costs. This section continues with a discussion of the political rationale for impact fees, political considerations, and a review of kinds of communities most likely to adopt impact fee programs. The overarching theme here is that impact fees are a form of land use regulation—not a tax—linked to comprehensive plans. As such, fees depend on these local plans, particularly the capital improvement program of such plans,

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5. "Development exactions" can be defined as:
the process by which developments are required to, as a condition of development approval:
1. Dedicate sites for public or common facilities.
2. Construct and dedicate public or common facilities.
3. Purchase and donate vehicles and equipment for public or common use.
4. Make payments to defray the costs of land, facilities, vehicles, and equipment in connection with public or common facilities.

DEVELOPMENT EXACTIONS 3 (James E. Frank & Robert M. Rhodes, eds., 1987).

6. *Id.*
7. PRACTITIONER'S GUIDE, *supra* note 2, at xx.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1-70.
12. Mandatory dedications require developers to dedicate parcels of land for public use. *See* DEVELOPMENT EXACTIONS, *supra* note 5, at 17-18.

for legal validity. In this context, impact fees are viewed as regulations that help finance and implement capital improvement programs.

The second section reviews the process of developing impact fee policy and methodology.[13] It contains many suggestions and recommendations for determining the need for impact fees and how to design a program. The discussion includes views from the development community regarding fees and encourages localities to involve affected citizens and interests in the policy development process. A thorough discussion of how to determine proportionate share is included, covering the following topics: steps communities should follow to ascribe facility costs to new development, how to credit new development for its past and future expected fiscal contribution to facilities, how to determine appropriate recoupment policies for fees applied to help fund existing facilities, and how to ensure that fees properly benefit payers.

Section three presents numerous examples of impact fee calculations. The section discusses simple fees (advance payment and subsequent recoupment as development occurs) and more complicated fees used to help finance ongoing capital improvement programs and involving sophisticated credit and recoupment policy issues.[14] The section also addresses a new kind of impact fee, the linkage fee.[15] Particularly noted is the linkage fee employed by the City of San Francisco for low- and moderate-income housing. Other linkage fee examples from across the nation are also analyzed.

The fourth section includes model statutes, ordinances, and administrative procedures to implement impact fee programs.[16] These are the legal instruments that make the assessment, collection, and dispersal of impact fees possible. Although the authors include model statutory language authorizing and providing state guidelines for impact fees, they suggest that communities in most states usually do not need explicit statutory authority to assess impact fees as long as such fees are a justified exercise of a local government police power.[17] The section and the book conclude with various tips, tricks, traps, and consequences of impact fee calculations.

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13. PRACTITIONER'S GUIDE, *supra* note 2, at 71-118.

14. *Id.* at 119-69.

15. Linkage fees are assessments on nonresidential development that are spent on social services such as low-income housing, day care, or public art. *Id.* at 2. They are materially different, therefore, from impact fees, which are used for infrastructure costs.

16. *Id.* at 169-278.

17. *Id.* at 169.

As previously noted, the authors strongly encourage localities to buttress the legal validity of impact fees by solidly embedding fee assessment in local comprehensive plan capital facility elements.[18] They observe that "it is easier to convince a judge of the reasonableness of an impact fee program if it is based upon and even required by specific comprehensive plan language."[19] They also note that it is "easier to satisfy the nexus requirements of the *Nollan* decision[20] if the purposes and implementation details of the impact fee program are set forth in the planning documents for the jurisdiction."[21] These comments are particularly relevant in states such as Florida that require land development regulations to be consistent with comprehensive plans.[22]

Nonetheless, even plan-based and directed regulatory impact fees must meet both prongs of the dual rational nexus test. The authors explain the two prongs of the rational nexus test as follows:

> 1. Impact fees must be calculated by measuring the needs created for public infrastructure by the new development charged the impact fees. Such charges cannot exceed the cost of such infrastructure to the relevant unit of local government.
> 2. Impact fees must be earmarked and spent for the purposes for which they are collected so as to benefit those who pay them.[23]

The Florida Supreme Court recently reaffirmed this test in the case of *St. Johns County v. Northeast Florida Builders Association*.[24] In that case, the court confirmed the ability of localities to impose a school impact fee tailored to certain prescribed standards but stayed enforcement of St. Johns County's school impact fee until the second prong of the dual rational nexus test had been met.[25] Of significance is the court's insistence that both prongs of the dual rational nexus test be met and the scrutiny and analysis of these criteria by the court.[26]

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18. *See generally id.* at 37-38.
19. *Id.* at 37.
20. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (land use regulation held unlawful where it did not further the same governmental purpose it was designed to regulate). *See also* PRACTITIONER'S GUIDE, *supra* note 2, at 35 (quoting Robert M. Rhodes, *The Impact of* Nollan *on Florida Law: Has the Tide Turned?* 3 GROWTH MGMT. STUD. NEWSL. (Center for Governmental Resp., U. of Fla. C. of L.), Jan. 1988, at 1, 2: "*Nollan* establishes a federal exaction test that requires a substantial, rationally linked, and, arguably, direct nexus between permit burden and conditions. An indirect nexus, even if reasonably related, will not pass federal constitutional muster.").
21. PRACTITIONER'S GUIDE, *supra* note 2, at 37.
22. FLA. STAT. § 163.3202(1) (1989).
23. PRACTITIONER'S GUIDE, *supra* note 2, at 33.
24. 583 So. 2d 635 (Fla. 1991).
25. *Id.* at 642.
26. *Id.* at 637-39.

At the outset, the court recognized that a school impact fee differs from a water and sewer or road fee.[27] This difference exists because many of the new residents bearing the burden of the school fee do not have children who will benefit from the new schools. The county's consultant, Dr. James C. Nicholas, one of the authors of the present volume, determined that on average there were 0.44 public school children per single family home in St. Johns County.[28] Based on this determination, the builders argued that the impact fee failed the first prong of the dual rational nexus test because many of the new residents would not impact the public school system and thus, the fee payment was not reasonably connected to actual needs generated by a large majority of the payers.[29] The court rejected this contention as "too simplistic."[30]

> The same argument could be made with respect to many other facilities that governmental entities are expected to provide. Not all of the new residents will use the parks or call for fire protection, yet the county will have to provide additional facilities so as to be in a position to serve each dwelling unit. . . . It may be that some of the units will never house children. . . . The St. Johns County impact fee is designed to provide the capacity to serve the educational needs of all one hundred dwelling units. We conclude that the ordinance meets the first prong of the rational nexus test.[31]

Thus, the court determined that a potential future need for facilities based on reasonable growth and new facility projections was sufficient to establish a valid connection between the need for the project and the cost of the service, thereby satisfying the first prong of the dual rational nexus test.

The question of whether the St. Johns' ordinance met the requirements of the second prong of the dual rational nexus test was "more troublesome."[32] The court reiterated that not every new unit of development had to benefit from the impact fee by having a child who could attend public school residing in that unit.[33]

> It is enough that new public schools are available to serve that unit of development. Thus, if this were a countywide impact fee designed

27. *Id.* at 638.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 638-39.
32. *Id.* at 639.
33. *Id.*

> to fund construction of new schools as needed throughout the county, we could easily conclude that the second prong of the test had been met.[34]

However, the St. Johns County impact fee did not apply county-wide.[35] It was not effective within the boundaries of a municipality unless the municipality entered into an interlocal agreement with the county to collect the fee.[36] Notwithstanding this limitation, the ordinance allowed impact fee funds to be spent anywhere in the county, and there was no prohibition against spending funds to build schools within a municipality that did not enter into an interlocal agreement.[37] Therefore, the court determined the fee failed the second prong of the rational nexus test because there was no restriction on the use of the funds to ensure that they would be spent to benefit fee payers.[38] Consequently, the court held that "no impact fee may be collected under the ordinance until such time as substantially all of the population of St. Johns County is subject to the ordinance."[39]

The court's concern that the fee meet both prongs of the rational nexus test and its thorough review of the county's efforts to do so portends greater judicial willingness to more closely scrutinize government action imposing and applying impact fees. General local government findings of public interest and even a credible plan-based determination of need will not alone save an impact fee that cannot meet the dual rational nexus test. This is particularly relevant as Florida localities expand the use of fees[40] and consider San Francisco's experience with affordable housing linkage fees.[41] If, as the authors suggest, linkage fees promote a social good not necessarily connected to service and facility needs generated by a fee payer's project,[42] these fees should fail the dual rational nexus test.

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. A 1991 survey found 133 local units of government imposing at least 414 "different active impact fees." ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1991 FLORIDA ACIR IMPACT FEE SURVEY 6 (September 1991) [hereinafter ACIR REPORT]. The 414 figure does not mean 414 different *types* of impact fees; it means 414 total, that is, where 10 counties each have a park impact fee, the survey counted 10 different fees. *See id.* at 5, 6. Furthermore, the survey also found increasingly exotic uses for impact fee revenues, including bike paths, libraries, and cultural facilities. *Id.* at 6.
41. PRACTITIONER'S GUIDE, *supra* note 2, at 164-68.
42. *Id.* at 164.

Although the authors offer a model for state legislation authorizing and setting guidelines for impact fees, they suggest that "some states, such as Florida, might be better off without impact fee enabling legislation since the courts have essentially hammered out a process that many legal scholars find adequate."[43]

I disagree. Florida needs statewide guidelines for local development impact fees. By suggesting that Florida rely only on case law for guidance, the authors place too much faith in a handful of court decisions and confer on the courts too much policy discretion. Florida appellate case law comprises only six cases since 1975,[44] five of which were decided before enactment of Florida's growth management legislation in 1985.[45] Impact fees are too important to be left—like an orphaned child—on the steps of the courthouse for care. Now that impact fees have general judicial support in Florida, numerous second-generation impact fee issues should be settled in state legislation.[46] It makes little sense to litigate these issues case by case; instead, sound and efficient public policy demands that these statewide policy issues be specifically resolved and articulated by law.

Legislation need not undercut or modify existing case law, which established local authority for the fees and created the dual rational nexus test. Indeed, legislation can expressly state that it is not intended to abrogate case law. Thus, local governments would lose no authority because of legislation.

Legislation can recognize what practice has made obvious: impact fees play an important role in paying for growth management.[47] The next step is to protect the funding source while enhancing growth

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43. *Id.* at 169.

44. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (upholding school impact fees where applied countywide); Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (upholding impact fees to pay for water and sewer facilities); Home Builders and Contractors' Ass'n v. Board of County Commissioners, 446 So. 2d 140 (Fla. 4th DCA 1983), *review denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976 (1984) (upholding road impact fees); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA), *review denied*, 440 So. 2d 352 (Fla. 1983) (upholding impact fees for parks); City of Miami Beach v. Jacobs, 341 So. 2d 236 (Fla. 3d DCA 1975), *cert. denied*, 348 So. 2d 945 (Fla.), *cert. denied*, 434 U.S. 939 (1977) (ordinance assessing monthly charge to property owners hooking up to certain fire lines held unconstitutional for lack of earmarking of funds); Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (impact fee held a tax because ordinance failed to specify how collected fees would be spent).

45. Ch. 85-55, 1985 Fla. Laws 207.

46. Impact fee legislation was proposed in Florida in 1991, but it did not pass. *See* FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF SENATE BILLS at 137, SB 1522; *id.*, HISTORY OF HOUSE BILLS at 338, HB 2261.

The authors cite to eight states with general impact fee legislation: Arizona, California, Georgia, Maine, Nevada, Oregon, Texas, and Vermont. PRACTITIONER'S GUIDE, *supra* note 2, at 38-39.

47. Local governments in Florida use impact fees as a source of more than a quarter of a

management requirements by integrating impact fees into local planning and plan implementation. Both goals can be achieved by impact fee legislation, which can ensure that impact fees are plan-based and are used to fund capital facilities and services identified in local plans. These legislative provisions would add certainty to the growth management process. They would help local governments and developers plan and budget while easing legitimate concerns of lenders created by uncertain regulations and governmental processes that impede or restrict development. Also, legislation that ties impact fees to comprehensive plans may provide a catalyst to break the development logjam in some localities caused partly by concurrency requirements.[48]

Legislation also can clarify areas in the law that the Florida cases have not addressed and that are murky. For example, it can clarify that localities may provide exemptions from fees to achieve other important goals of local comprehensive plans, such as providing affordable housing. It can confirm localities' ability to vary impact fee rates by service area, a decision that would be left to local government discretion. Legislation can expressly authorize localities to recoup the costs of services provided to new projects through existing facilities, much like Maine's impact fee law.[49] It can allow for credits to developers for exactions or contributions made in connection with prior development but benefitting similar facilities. Furthermore, legislation can clarify the authority of local units of government to enter into intergovernmental agreements to jointly pay for facilities and services through impact fees, a coordination of growth planning that is currently woefully inadequate.

Legislative guidelines can also provide for the creation of reasonably sized service areas or "benefit zones" designated to receive the specific benefit promised by the collected fees. The designation of these areas could be crucial to surviving the second prong of the dual rational nexus test: that fees exacted from development requiring new or improved services and facilities be used in turn to offset the costs of those services and facilities.

Finally, legislation could authorize payment of impact fees in installments. This provision would provide greater security to bond houses by ensuring a steady stream of impact fee revenue, thereby enhancing the bonding of fees, and would facilitate development by re-

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billion dollars of revenue and projects in lieu of general revenue. ACIR REPORT, *supra* note 40, at 15.

48. Douglas P. Buck and Richard E. Gentry, *The Case for Impact Fee Legislation*, QUALITY CITIES, Sept. 1991, at 26.

49. ME. REV. STAT. ANN. tit. 30, § 4354 (Supp. 1990).

moving the requirement that the developer pay the full impact fee up front.

Authors Nicholas, Nelson, and Juergensmeyer have produced a useful and usable impact fee cookbook. It complements well the related American Planning Association publications, *Development Exactions*[50] and *Development Impact Fees*[51] and is recommended to the impact fee practitioner and policymaker.

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50. DEVELOPMENT EXACTIONS, *supra* note 5.
51. DEVELOPMENT IMPACT FEES (Arthur C. Nelson, ed., 1988).